

CHAPTER 8

CONTRACT ADMINISTRATION

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Exhibit 8-1. Contract Administration Phase of the Federal Acquisition Process.

Learning Objectives

The learning objectives for this chapter are located at the front of the section or subsection to which they apply and are highlighted with gray shading. After completion of this chapter, you will be expected to know all the highlighted learning objectives for this chapter.

Exhibit 8-2. Learning Objectives.

CHAPTER INTRODUCTION

Post-Award Administration is the last phase of the federal acquisition process. Just having a contract, however, does not satisfy your agency's need. The need will be satisfied only when the contractor delivers the required supplies or services on a timely basis and at the agreed-upon price. This is the fundamental objective of **Contract Administration (CA)** and includes the following basic functions (see Exhibit 8-1):

- **Initiation of Work and Modification.** The Government and contractor, respectively, plan and initiate performance of the work. With respect to the Government, this involves such steps as delegating responsibility for satisfying the Government's obligations under the contract, orienting the contractor, consenting to subcontracts, monitoring compliance with subcontracting requirements, modifying the contract when necessary, exercising options, and placing orders against the contract.
- **Quality Assurance.** The Government and contractor, respectively, assure that work satisfies the contract's requirements. On the part of the Government, this involves such steps as inspecting and accepting contract deliverables, determining the excusability of delays, invoking formal remedies to bring contract performance back into line, and documenting the contractor's performance.
- **Payment and Accounting.** The Government determines the amount due the contractor and, as provided in the contract, issues payment.
- **Special Terms.** Contracting Officers must ensure compliance not only with the contract schedule but also with any and all other contractual requirements (e.g., compliance with labor and environmental clauses).
- **Contract Closeout or Termination.** When all deliverables have been accepted, the Government verifies that the contract is physically complete and that all applicable terms and conditions have in fact been satisfied. This act of closeout, however, may be disrupted by contractor claims or contract termination (either for convenience or cause/default).

8.1 INITIATION OF WORK AND MODIFICATION

Initiation of Work And Modification	Quality Assurance	Payment & Accounting	Special Terms	Contract Closeout Or Termination
54. Contract Administration Planning 55. Post-Award Orientations 56. Consent to Subcontracts 57. Subcontracting Requirements 58. Contract Modifications 59. Options 60. Task & Delivery Order Contracting				

Exhibit 8-3. Steps in Initiating Work Under the Contract and Modifying Contracts

Unit 54 Contract Administration Planning

FAR Part 43

- Describe what CO's ought to plan, at minimum.
- Describe typical elements of a contract administration plan.
- Describe the delegation of authority to CORs and COTRs.
- List duties typically delegated to ACOs.

Informal Planning

Although the FAR does not require the CO to prepare a formal contract administration plan, the CO is responsible for ensuring that the parties have complied with all terms and conditions of the contract. At minimum, contracting officers should therefore track receipt of the deliverable (or performance of the service), acceptance, and payment under the contract. This is true, for example, when contracting for the furnishing and delivery of standard commercial items.

CONTRACT ADMINISTRATION PHASE

Formal Plans

A formal contract administration plan is essential when the contract involves large dollar amounts or complex technical requirements. Those contracts place many duties and responsibilities on both parties. The contract administration plan should provide for:

- An appropriate level of surveillance or monitoring of contractor performance.
- Timely and proper performance of the Government's responsibilities.

TYPICAL ELEMENTS OF CONTRACT ADMINISTRATION PLANS

- Title of the contract, related identifiers, and criticality (per FAR 42.1105).
- Identity of the contractor and key contractor personnel.
- Location of files on the contract and the contractor.
- Brief description of the work to be performed (from § B-D of the UCF).
- Place of performance and/or delivery points (from §F of the UCF).
- Reporting requirements (from §H and I of the UCF).
- The contractor's milestones (from §F-I of the UCF) for such critical events as:
 1. First article testing and reporting.
 2. Performance or delivery.
 3. Submission of progress reports.
 4. Submission of invoices and other data related to payment.
- Tasks to be performed by Government personnel and milestones for each such task, with respect to such functions as:
 1. Monitoring the contractor's quality assurance program.
 2. Furnishing Government property to the contractor and monitoring its use.
 3. Reviewing and responding to contractor reports.
 4. Receiving, inspecting, and accepting the work.
 5. Certifying costs incurred or physical progress for payment purposes.
 6. Monitoring compliance with the small business subcontracting plan.
- Identity of the CO's Representatives (CORs) and Technical Representatives (COTRs).
- Tasks delegated to each COR and COTR (including any limits on their authority).

Exhibit 8-4. Typical Elements of Contract Administration Plans.

CHAPTER 8

Delegating Authority to CORs and COTRs

CO's usually delegate authority to CORs and COTRs for such functions as inspection and acceptance. The delegations are generally made in writing and specify any limits on the delegated authority. In addition, CO's ensure that CORs and COTRs are aware of the doctrine of constructive changes and the potential consequences of exceeding the limits on their authority.

Delegating Authority to ACOs

The procuring contract activity may retain a contract or assign it to another contracting office for administration:

- When a contractor's facility is located at a great distance from the buying office, CA functions may be assigned to another contracting office in the contractor's locality. For example, if a CO in Arlington, Virginia awards a contract to a company in Chicago, the CO might ask a contracting activity in Chicago to administer the contract.
- The contract may be delegated to a Contract Administration Office which specializes in contract administration tasks.

Contract Administration offices may employ Administrative Contracting Officers (ACOs), who are authorized by the Procuring Contracting Officer (PCO) to perform selected contract administration functions. However, even when the contract is assigned to another office for administration, the PCO often remains involved in such post-award functions as modifying the terms and conditions of the contract.

The Government's major CA organization is the **Defense Contract Management Command (DCMC)** within the Defense Logistics Agency. DCMC supports Defense COs but also provides CA services to civilian agencies on a reimbursable basis.

ACO Functions

The FAR lists more than sixty functions often delegated to ACO's. Some of those functions are listed on Exhibit 8-5. When the contract is not assigned to an ACO, many of these functions are performed by the procuring office.

EXAMPLES OF ACO FUNCTIONS

- Conduct post-award orientation conferences.
- Review and approve or disapprove contractor's request for payments.
- Administer security requirements, if any.
- Perform property administration.
- Perform technical surveillance.
- Ensure compliance with quality assurance requirements.
- Review, approve or disapprove, and survey the contractor's purchasing system.
- Monitor small business subcontracting plans.
- Monitor overall performance to help ensure timely deliveries.

Exhibit 8-5. Examples of ACO Functions

Unit 55 Post-Award Orientations

FAR Subpart 42.5

- State the situations calling for a post-award orientation.
- State the major purposes of the orientation.

When To Conduct Post-Award Orientations

In many cases, contracts are awarded and contractor performance begins routinely without any post-award orientation as such. In other cases, a post-award orientation may take the form of a phone call or letter. Post-award orientation conferences are normally held for complex contracts. Conferences are encouraged when contracting with small business and small/disadvantaged business concerns.

Purposes

CO's use post-award orientation conferences to:

- Ensure that both parties have a clear and mutual understanding of all contract requirements (especially when dealing with contractors who are inexperienced in furnishing deliverables to the Government),
- Identify and resolve potential problems, and
- Introduce the Government's representatives, furnish notices and other data to the contractor, and otherwise set the stage for a good working relationship under the contract.

Often, contractor personnel who will perform or administer the work did not participate in events leading up to contract award. An orientation conference can help them understand the terms and conditions of the contract.

On the other hand, do not conduct post-award orientation conferences for the purpose of determining whether or how to modify the contract.

Unit 56 Consent to Subcontracts

FAR Subpart 44.2

- State conditions under which the Government has the right to consent to subcontracting.
- State the factors to consider in making the consent decision.
- State how consent may be waived.

Right of Consent

In many contracts, much of the work is actually performed by subcontractors. Thus, for prime contractors, the “initiation” function often includes the awarding of subcontracts. Contractors are generally given a great deal of flexibility in determining the extent to which they will utilize subcontractors. However, some contracts include a clause that requires the Government’s prior consent before the contractor can award a subcontract. Such clauses do not necessarily require prior consent to all subcontracts that the prime contractor plans to award. Rather, the requirement for consent is triggered by such factors as the:

- The type of contract that has been established with the prime contractor.
- Dollar value of the subcontract.
- Type of subcontract (fixed-price/cost reimbursement).
- Type of work to be performed by the subcontractors.

Factors in Consenting

When exercising consent authority, the CO will evaluate proposed subcontracts to ensure, among other things, that:

- The proposed subcontract is proper (e.g., the CO might ask: Is the proposed subcontractor on the “List of Parties Excluded From Government Procurement Programs”? Does the proposed subcontract establish a prohibited cost plus percentage of cost arrangement?).
- Proposed prices are reasonable (where possible, based on adequate price competition).

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- The subcontract is placed with due regard for:
 1. Subcontractor responsibility
 2. Small business participation
 3. Competition requirements
 4. Other considerations specified in the FAR

Waiving Consent Requirements

Sometimes, a Government activity will conduct a Contractor Purchasing System Review (CPSR). If the contractor's purchasing system meets CPSR standards, the CO may rely on that system and "waive" the need for the contractor to obtain Government consent before placing subcontracts.

Unit 57 Subcontracting Requirements

- Identify the responsibilities of COs and ACOs for enforcing subcontracting requirements
- Identify the potential remedies for failing to attain subcontracting goals and rewards for exceeding such goals.

CO and ACO Responsibilities

FAR 19.705-6 and 19.706

The primary responsibility of ACOs and COs is to verify compliance with subcontracting plans (if any) in the contract. This involves:

- Obtaining quarterly reports (SF 295) under the plan.
- Determining whether the contractor has attained the subcontracting goals.
- If the contractor has not attained the goals, investigate the contractor's efforts and make a determination as to whether the contractor made a good faith effort to comply with the subcontracting plan.
- Informally attempting to resolve and remedy problems in goal accomplishment before invoking formal contractual remedies.

Remedies and Rewards

If the contractor has failed to comply with the subcontracting plan AND has not made a good faith effort to accomplish the goals of that plan, then the CO can, if and as provided in the contract, either assess liquidated damages or withhold consent to subcontracts. On the other hand, when a contractor exceeds the goals thanks to that contractor's good efforts, then the CO may be able to reward the contractor with an incentive payment, if and as provided in the contract.

Unit 58 Contract Modification

FAR Part 43

- Define contract modification.
- Distinguish unilateral from bilateral modifications.
- Explain “scope of work” as a constraint on the CO's ability to modify a contract

Definition

A contract modification is any written change in the terms of a contract. Modifications to contracts for non-commercial items generally can be either “unilateral” or “bilateral” On the other hand, FAR 52.212-4(c) allows only bilateral modifications of contracts for commercial items (although that can be changed by an addendum that, for instance, incorporates an options clause).

Unilateral Modifications

A contract modification is any written change in the terms of a contract. A modification may be either “unilateral” or “bilateral.”

Unilateral modifications are issued and signed by the CO. Unilateral modifications are used for making:

- Administrative changes that do not affect the substance or price of the contract (e.g., changing the address of the payment office).
- Substantive changes that result in equitable adjustments in the contract price, delivery schedule, or both.

Examples of clauses in contracts that authorize unilateral modifications:

- “Changes” (i.e., FAR clauses 523.243-1, 243-2, or 243-3).
- Government Property.
- Option for Increased Quantity.

If a change order affects the contractor's costs or ability to meet the delivery schedule, the parties attempt to reach a bilateral agreement on an equitable adjustment in the contract's price and delivery terms. If an agreement cannot be reached, the CO unilaterally determines the amount. The contractor may then file a claim for the amount in dispute (see Unit 82).

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Bilateral Modifications

Bilateral modifications (i.e., supplemental agreements) are negotiated and signed by both the CO and an agent of the contractor. A bilateral modification may be issued:

- To modify the terms of a contract that may not be unilaterally changed by the CO.
- In place of a unilateral modification when both parties negotiate and agree to the equitable adjustment prior to effecting the change.
- To incorporate an agreement on an equitable adjustment in price and other contract terms after issuance of a unilateral change.

Scope of Work

Generally, neither bilateral nor unilateral modifications may change the scope of work in a contract (although a bilateral change in scope may be proper when full and open or maximum practicable competition is not required for the additional work). Determining what changes are within the scope of the contract is a matter of judgement. The general rule is that scope of work circumscribes the intentions of the parties at the time of contract award. For example, a contract to fabricate and deliver office furniture cannot be modified to also provide for furnishing and installing microcomputers.

Unit 59 Options

FAR Subpart 17.2

- Describe the process for exercising options.

Contracts often contain options for increasing the quantity being supplied to the Government. For example, a contract may provide for the delivery of 1,000 gargoyles at a specified price of \$8,000 per unit by March 30. The contract may also contain an option to supply an additional 500 units at \$10,000 per unit by that same date, provided the option is exercised by January 1. If the Government needs the additional units, the CO can exercise the option unilaterally. However, before exercising the option, the CO must determine that:

- The additional quantity would meet an existing need.
- Funds are available to exercise the option.
- Exercising the option would be the best alternative for meeting the need, based either on a formal solicitation or on market research.

Note that service contracts also may include an option for extending the period of performance.

Unit 60 Task and Delivery Order Contracting

FAR Subparts
16.5 and 16.7

- Distinguish between orders against Basic Ordering Agreements and orders against indefinite delivery contracts versus orders .
- Identify the CO's responsibilities for ordering against contracts and agreements.
- Describe the basic requirement for multiple awards when establishing indefinite quantity task and delivery order contracts.

Ordering Against
Basic Ordering
Agreements

Basic Ordering Agreements (BOAs) are used to expedite contracting for uncertain requirements. For example, when awarding a contract for maintenance and overhaul of ships, the CO may also establish a BOA with the contractor for spare parts. The BOA provides for the placement of orders for a category of supplies or services, should they be needed as the work progresses. In the case of BOAs, each order constitutes a separate and independent contract.

Ordering Against
Indefinite Deliv-
ery Contracts

An indefinite-delivery contract may be used when the exact time, quantity, and/or place of delivery of specified supplies or services is not known at the time of contract award. For example, GSA uses indefinite delivery contracts to establish sources for common supply items.

During the period of the contract, orders may be placed for a specific quantity of the items where needed. Each order generally specifies the time, delivery point, and quantity for a partial shipment under the contract and, as such, merely fulfills the contract's terms and conditions.

General Rules for
Ordering

When placing orders against BOAs and indefinite-delivery contracts, the CO ensures that:

- The appropriate type and amount of funds are available.
- The order is within the scope and period of the contract and BOA and, for contracts, within the maximum value of the contract.
- The order is NOT be barred by any other limitations (e.g., on non-personal services) in the contract/BOA or the FAR.
- Is in line with all restrictions on advisory and assistance contracts (FAR subpart 9.5)

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- The BOA or contract is otherwise available to obtain supplies or services. Note that:
 - If BOAs are used, the CO must comply with FAR competition and publicizing requirements prior to placing each order.
 - Orders placed under Indefinite-Delivery Contracts need not be publicized and competed if these requirements were met when the contract was placed.

Ordering Against Multiple Award Task and Delivery Order Contracts

In FAR Part 16, the FAR defines a task order contract as “a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.” In contrast, the FAR defines a delivery order contract as a contract “for supplies that does not procure or specify a firm quantity of supplies (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract.”

The FAR establishes a general preference for multiple awards when using indefinite-quantity contracts. When ordering against a multiple award task or delivery order contract, the basic requirement is to fairly consider all awardees. Exhibit 8-6 lists steps in providing “fair consideration”.

THE FAIR CONSIDERATION PROCESS IN MULTIPLE AWARD TASK ORDER CONTRACTING	
<i>Steps</i>	<i>Rules</i>
1. Determine whether the requirement may be ordered under the contract.	See the general rules for determining whether an order can be placed against an indefinite delivery contract
2. Determine whether to consider more than one awardee.	<p>Consider a single awardee for a particular order in excess of \$2,500 ONLY IF one or more of the following apply.</p> <ul style="list-style-type: none"> • Considering all awardees would result in unacceptable delay. • Only one awardee can provide the services or supplies of the required quality given the unique or highly specialized nature of the requirement. • A sole-source order is in the interest of economy and efficiency as a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order. • An order must be placed with the awardee to satisfy a minimum guarantee.
<p>3. If you plan to consider more than one awardee, determine which (if any) to contact prior to placing an order. Subtasks:</p> <ul style="list-style-type: none"> • Identify information necessary to consider the awardees. • Review information already in hand. Given that data . . . • Exclude as many awardees as possible from further consideration prior to informally soliciting offers and/or negotiating. • Select one or more awardees for pre-order contact. 	<p>You must contact an awardee prior to placing an order if:</p> <ul style="list-style-type: none"> • The contract requires pre-placement notification to all awardees, OR • You do not have all information necessary to fairly consider the awardee for the order. <p>Absent pre-placement notification requirements, contact NO awardee if all necessary information is on hand to place an order (e.g., if awardees electronically update fixed prices for specified tasks on a real-time, continuous basis). Otherwise, comply with the contract's evaluation procedures and selection criteria in excluding awardees from pre-order contact. Document reasons for excluding an awardee from pre-order contact in sufficient detail to convince the Ombudsman that excluded awardees were fairly considered for the order.</p>

Exhibit 8-6. The Fair Consideration Process In Multiple Award Task Order Contracting

<p align="center">THE FAIR CONSIDERATION PROCESS IN MULTIPLE AWARD TASK ORDER CONTRACTING</p>	
<i>Steps</i>	<i>Rules</i>
<p>4. If necessary for awarding the order, contact one or more of the awardees. Potential types of contacts:</p> <ul style="list-style-type: none"> • Requests for offers or quotes (written and/or oral). • Factfinding and/or negotiations. 	<p>Only request quotes or offers when necessary to comply with the contract's selection procedures and criteria. Conduct any pricing, technical evaluation, factfinding, and negotiations as professionally and thoroughly as would be done in awarding a new contract.</p>
<p>5. Select an awardee for the order.</p>	<p>Properly adhere to selection criteria and evaluation procedures specified in the contract.</p>
<p>6. Negotiate any unsettled terms of the order (e.g., when you did not solicit and accept a complete proposal from one of the awardees).</p>	<p>Conduct any pricing, technical evaluation, factfinding, and negotiations as professionally and thoroughly as would be done in awarding a new sole source contract.</p> <p>When negotiating prices based on estimates of direct labor hours by skill category, comply with FAR policies on professional employee compensation, uncompensated overtime, and cost realism.</p>
<p>7. Prepare and issue the order.</p>	<p>When informally soliciting offers and placing orders, there is no requirement for worldwide publicity (e.g., a CBD synopsis) under FAR 5.201.</p>
<p>8. Respond to the appropriate "Task Order Contract And Delivery Order Contract Ombudsman".</p>	<p>This will be necessary if the Ombudsman has any questions about placement of the order. An Ombudsman is a senior agency official independent of the contracting officer. His/her job is to review complaints from awardees and ensure that all are afforded a fair opportunity to be considered, consistent with the procedures in the contract.</p> <p>GAO will only hear protests if the protest alleges that the order increases the scope, period, or maximum value of the contract.</p>
<p>9. Administer the order.</p>	

Exhibit 8-6. The Fair Consideration Process (Continued)

8.2 QUALITY ASSURANCE

Initiation of Work And Modification	Quality Assurance	Payment & Accounting	Special Terms	Contract Closeout Or Termination
	61. Monitoring, Inspection, and Acceptance 62. Delays 63. Stop Work 64. Commercial/ Simplified Acquisition Remedies 65. Noncommercial Remedies 66. Documenting Past Performance			

Exhibit 8-7. Steps in Assuring Quality

Unit 61 Monitoring, Inspection, and Acceptance

FAR 12.402 and Part 46

- Explain the importance of monitoring performance.
- Identify typical monitors.
- State the CO's role in inspection and acceptance.
- State the four basic types of performance problems.
- List steps in resolving performance problems.

Why Monitor Performance

Fixed-price contracts bind contractors to deliver the specified goods and/or services. However, even when the contractor is fundamentally responsible for the timely delivery of acceptable deliverables, the CO must at times protect the Government's interests through such means as:

- Monitoring contractor performance.
- Inspecting contractor products.
- Informing the contractor of any problems.
- Identifying and implementing contractual remedies.

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In cost-reimbursement, time and materials, and labor hour contracts, the contractor is obligated only to make a good faith effort to perform the work of the contract within the ceiling price or limitation on costs established in the contract. In these contracts, surveillance of the contract is all the more important to ensure satisfactory performance.

Who Monitors Performance

Monitoring should be consistent with the dollar value, type, and complexity of the contract. Who monitors a contract therefore is a question that depends on the contract.

- Under a fixed-price supply contract, the end user often inspects and accepts the deliverable as the CO's representative.
- Under a production contract, a quality assurance specialist often represents the CO, in terms of inspecting and accepting the work.
- In system contracting, a team or entire contract administration activity might be involved in monitoring, inspection, and acceptance.

The CO's Role

If a monitor identifies a problem that may have an adverse effect on the contract, the monitor should immediately notify the CO. The same is true if the monitor finds that Government action or failure to act is the problem (e.g., failure to provide adequate Government-furnished property, if required by the contract). Upon notice of a problem, the CO's role is to resolve the problem by taking one or more of the appropriate steps in Exhibit 8-8.

TYPES OF PERFORMANCE PROBLEMS

Schedule:	Failure to deliver or make progress toward timely delivery.
Cost :	The contractor is exceeding cost estimates on a cost-reimbursement contract or is so over budget under a fixed price contract as to endanger both schedule and performance (or even its very survival).
Quality:	The supplies or services in process or being delivered do not meet contract requirements or are not expected to do so.
Compliance:	The contractor is not complying with other terms and conditions of the contract (e.g., with clauses on labor rates, clean air and water, subcontracting goals, maintaining a drug-free workplace, etc.).

Exhibit 8-8. Types of Performance Problems

If such problems surface, the CO or ACO is ultimately responsible for their resolution.

STEPS IN RESOLVING PERFORMANCE PROBLEMS

1. Verify and document evidence of the problem.
2. Determine the potential impact on cost, delivery, and other requirements.
3. Determine whether the delay (if any) is excusable or whether the Government is otherwise at fault to any extent (see Unit 62).
4. If necessary, stop work-in-process while the problem is being resolved (see Unit 63).
5. Seek an informal resolution of the problem.
6. Where necessary, invoke any applicable contractual remedy (e.g., rejection of work, liquidated damages, invoking of a warranty, or issuance of a cure or show cause notice—see Units 64 and 65).
7. Modify the contract when and as necessary to resolve the problem (see Unit 58).
8. As a last resort, terminate the contract (see Unit 83).
9. Keep all interested parties informed of the contract's status and document the file.

Exhibit 8-9. Types of Performance Problems

Unit 62 Delays

FAR 52.212-4(f),
52.249-8, and
52.249-9

- List the major causes for contract delays.
- Distinguish “excusable” from non-excusable delays.

Causes

When contract performance is delayed, it is due to one, or a combination, of the three causes listed in Exhibit 8-10, below.

CAUSES OF DELAYS

- Contractor's negligence or fault.
- Government negligence or fault (e.g., failure to furnish Government property at the place and time specified in the contract).
- Factors beyond the control of either (e.g., acts of God, fire, floods, epidemics, quarantine restrictions, and—under some circumstances—strikes).

Exhibit 8-10. Causes of Delays

Is the Delay Excusable?

When one or both of the last two causes apply, the delay might be “excusable” in part or in whole. To the extent that the delay is “excusable,” the contractor may be entitled to an extension of the delivery schedule without consideration to the Government. If the Government is at fault, the contractor may also be entitled to an equitable adjustment in the contract price. The CO is responsible for determining whether the delay is excusable, the extent to which it is excusable, the length of any time extension in the delivery or performance schedule, and any necessary equitable adjustment.

Unit 63 Stop Work

FAR Subpart
42.13

- State situations under which a stop work order is necessary.
- Describe the “stop work” procedure.

When Work may
be Stopped

Some contracts include a clause (e.g., FAR clause 52.242-15) that gives the CO the right to stop a contractor’s work, in whole or part, to protect the best interests of the Government. Work stoppages tend to be costly as a rule and should only be contemplated when the benefits outweigh the costs. Among other reasons, a stop work order might be necessary when:

- Considering the need for terminating the contract (although a stop work order may not be used in lieu of a termination notice).
- The Government cannot furnish property or services per the contract schedule.
- Quality assurance personnel request that a production line be stopped to allow recalibration of their tools.
- The Government needs time to consider a contractor proposal for substantially changing the way the product is made.
- The requiring activity is considering a contract modification that would substantially change the end product.

CHAPTER 8

The Stop Work Procedure

In such situations as the above, it may be in the best interests of the Government to temporarily stop the work-in-process. The CO may unilaterally stop work for 90 days, or the work may be stopped for a longer period to which the contractor and the CO mutually agree. At the end of the stop work period, work resumes unless the CO:

- Extends the stop work period through a supplemental agreement,
- Cancels the stop work order, thus permitting work to resume prior to expiration of the stop work period, or
- Terminates the contract for either default or convenience.

The contractor must comply with the terms of the order and take reasonable steps to minimize costs associated with the work stoppage.

Units 64 and 65 Commercial/Simplified Acquisition Remedies and Noncommercial Remedies

FAR 12.4, 46.407, 46.7, 49.607, 52.212-4 (a) and (o), and 52.213-4(d) and (h)

- Describe general considerations in selecting and applying remedies.
- State the major contract remedies.
- Identify the primary differences between remedies available under contracts for commercial items and those available under contracts for non-commercial items.

Selecting and Applying a Remedy

In most cases, contractor performance problems can be informally resolved. At other times, the CO must invoke the formal remedies in the contract. Remedies available to the CO depend, in large part, on the specific clauses in the contract. For instance, many contracts do not have a liquidated damages clause. See Exhibit 8-11 for a list of typical remedies.

When a remedy is necessary, select the remedy that will best minimize the impact of contractor performance problems on performance, delivery, and cost. Obtain reasonable consideration for any relief granted the contractor from the contract's original terms and conditions. Document all decisions and contacts with the contractor sufficient to support the Government's position in disputes or court proceedings. Correctly follow prescribed procedures for the remedy.

EXAMPLES OF CONTRACTUAL REMEDIES

Assessment of liquidated damages (i.e., a dollar amount charged for each day deliveries are late or for other breaches, if and as specified in the contract).

Rejection of work that does not conform to the contract's requirements. Generally when work is rejected, the contractor must either (1) correct the work at no additional cost to the Government or (2) offer other consideration.

Exercise of the applicable warranty or guarantee expressly established in the contract or, in the absence of an express warranty, of an implied warranty.

Issuance of a "cure" notice or "show cause" notice. Both notices are preliminary to a termination for default if the contractor does not overcome the problem.

- A cure notice is issued when the contractor has sufficient time left on the contract (i.e., 10 days or more prior to the contract's delivery date) to correct the problem and still meet the delivery schedule. The cure notice provides the contractor with an opportunity to convince the CO that the problem will be cured and that termination for default is therefore not necessary.
- A show cause letter notifies the contractor that a default termination is impending and provides the contractor with an opportunity to "show cause" as to why such action should not be taken.

Termination for cause or default, in which case the Government can obtain the deliverable from another contractor and bill the defaulted contractor for the excess costs of the reprocurring the deliverable (see Unit 83).

Exhibit 8-11. Examples of Contractual Remedies

Commercial Vs.
Non-Commercial
Remedies

Federal contracts for non-commercial items are unique in establishing a premise of "finality of acceptance". Absent an express written warranty in the contract, the Government cannot reject work that has been accepted unless the CO can prove that:

- Problems with the accepted deliverable result from "latent" defects (i.e., defects that a reasonable inspection process could not detect).
- Acceptance was based on fraud.
- Acceptance was based on gross mistake amounting to fraud.

Given this principle of "finality", the Government can only protect itself from flawed deliverables by rigorously inspecting deliverables prior to acceptance.

In contrast, contracts between buyers and sellers in the private sector — especially those written in express or implicit compliance with provisions of the Uniform Commercial Code (UCC) — put the obligation on the supplier to assure that deliverables are of the requisite quality. Acceptance is not final; the buyer may obtain redress after acceptance if the deliverable does not work or performance is not satisfactory.

FAR clauses 52.212-4 and 52.213-4 establish comparable rules in contracts for commercial items and in contracts awarded through simplified acquisition procedures for non-commercial items. Both clauses allow the CO to:

- Revoke acceptance and reject work if the CO has reported or will report the defect to the contractor:
 - Within a reasonable time after the defect was discovered or should have been discovered; and
 - Before substantial change occurs in the condition of the item, unless the change is due to the defect in the item.
- Seek redress based on the UCC implied warranties of merchantability and fitness for a particular purpose (unless those warranties are supplanted through an addendum by an express written warranty).

Critical questions for the Government in rejecting work under these clauses is whether there is sufficient evidence to sustain rejection and whether the Government rather than the contractor is in part or in whole responsible for problems with the deliverable. Among the considerations:

- Has the Government accepted the deliverable (either explicitly or implicitly by silence, late rejection, or retention and use of goods) — and, if so, on what date did acceptance occur?
- Did the Government inspect the deliverable prior to acceptance? If so, was the defect patent (i.e., discoverable through inspection) or latent? Was fraud (or gross mistake amounting to fraud) the reason a discoverable patent defect survived inspection prior to acceptance?
- Was acceptance predicated on the reasonable assumption that the non-conformity would be cured (discovery at time of acceptance)?
- Was acceptance reasonably induced by the seller's assurances (no discovery at the time of acceptance)?
- Is the Government estopped by reason of accepting nonconforming work under a prior contract for the same requirement?

Note: If the Government is at fault, options may include modifying the contract or terminating for convenience.

Unit 66 Documenting Past Performance

FAR Subparts 9.4 and 42.15

- Describe requirements for documenting past performance.
- Define “Past Performance” information.
- Describe procedures for obtaining contractor feedback on performance evaluations and for retaining and providing access to such evaluations.
- State the CO’s role in reporting contractors to debarring officials.
- Explain the consequences for existing contracts when a contractor is debarred.

Requirement to Document Past Performance

When work on the contract is completed, the Government must prepare an evaluation of contractor performance for contracts above \$100,000. Exceptions:

- Contracts awarded under FAR Subparts 8.6 and 8.7.
- Construction and A&E contracts, which are covered by separate requirements at FAR §36.201 and 36.604.

Officials responsible for the evaluation typically solicit input from the technical office, contracting office, and (where appropriate) end users.

Past Performance Defined

Past performance information is information that is relevant to future source selections on a contractor’s actions under previously awarded contracts. This includes information on such matters as the contractor’s:

- Record of conforming to contract requirements and to standards of good workmanship.
- Record of forecasting and controlling costs.
- Adherence to contract schedules, including the administrative aspects of performance.
- History of reasonable and cooperative behavior and commitment to customer satisfaction.
- Business-like concern in general for the interest of the customer.

Contractor Feedback

COs must provide copies of the agency evaluation to the contractor as soon as practicable after completing the evaluation. Give the contractor at least 30 days to comment on the evaluation. If the parties disagree about the evaluation, refer the evaluation to a level above the contracting officer. However, the contracting agency makes the final decision.

CHAPTER 8

Access and Retention

Retain copies of the evaluation, contractor response, and review comments (if any). Mark this information with the legend “Source Selection Information.” Only release the evaluation to other Government personnel and the contractor whose performance is being evaluated. Destroy the evaluation within three years after completion of contract performance.

Reporting Performance Problems

The CO is responsible for resolving performance problems using—where necessary—the remedies provided for in the contract. If such performance problems re-occur, or if the CO suspects that the contractor may be guilty of unethical business practices, report such problems or suspicions to the agency’s debarring official.

The CO should report such performance problems as:

- Repeated late deliveries.
- Repeated rejections of work.
- Work of marginal quality.
- Violation of the Drug-Free Workplace Act .

The CO should also report any evidence of such unethical business practices as:

- Fronting for a debarred contractor.
- Collusion.
- Offering of gratuities.
- Kickbacks to suppliers.

The CO, or others who monitor the contractor, follow agency procedures in reporting any of the above situations to the agency “debarring official.”

The Debarring Officials Options

The debarring official assesses the report, along with reports on that same firm(if any) from other COs. Through investigation, the debarring official determines whether the contractor should be:

- Debarred,
- Suspended, or
- Declared ineligible.

Suspensions are temporary, generally not exceeding 12 months unless legal proceedings have been initiated. Debarments vary, depending on the seriousness of the cause, but generally do not exceed three years. Ineligibility, however, runs until the cause for the ineligibility is corrected.

CONTRACT ADMINISTRATION PHASE

Impact on Existing Contracts

A contractor who is listed as debarred, suspended, proposed for debarment, or ineligible may not receive new contracts. However, agencies may continue contracts (or subcontracts) in existence at the time. Contracts may not be renewed or extended unless the agency head or designee states in writing the compelling reasons to do so.

8.3 PAYMENT AND ACCOUNTING

Initiation of Work And Modification	Quality Assurance	Payment & Accounting	Special Terms	Contract Closeout Or Termination
		<ul style="list-style-type: none"> 67. Invoices 68. Assignment of Claims 69. Administering Securities 70. Administering Financing Terms 71. Unallowable Costs 72. Payment of Indirect Costs 73. Limitation of Costs 74. Price and Fee Adjustments 75. Collecting Contractor Debts 76. Accounting & Estimating Systems 77. Cost Accounting Standards 78. Defective Pricing 		

Exhibit 8-12. Steps in Paying Contractors and Evaluating Their Accounting Systems

Unit 67 Invoices

- State the CO's role in processing contractor invoices.
- Identify several types of withholdings and deductions that would reduce payments to contractors.
- Describe prompt payment requirements.

Processing Invoices

Contractors submit invoices for payment, based on:

- The contract price for work delivered and accepted,
- Costs incurred, or
- Progress made under the contract (e.g., percent of physical completion).

Invoices must be approved by the CO or a representative of the CO. The purpose of the approval process is to protect the interests of the Government by ensuring that payment (partial or total) is commensurate with the work performed. The CO also must ensure that payments are reported to the IRS.

Withholdings and Deductions

At times, the CO does not authorize payment in full of the invoiced amount. The following are among the many reasons for paying less than the amount invoiced:

- To reflect adjustments resulting from contract modifications.
- To take discounts for early payment.
- To resolve discrepancies between invoiced amounts and contract prices.
- To create a "set-off" fund for the collection of debts owed to the Government.
- To reflect invoiced items that have not been received or accepted.
- To avoid paying for unallowable costs.
- To retain a percentage of the fee, prior to the final invoice, as provided in cost reimbursable contracts.
- To liquidate progress payments.

CHAPTER 8

Prompt Payment

FAR Subpart 32.9

The Government is also obliged to pay its bills promptly to avoid paying interest penalties to the contractor. In general, to avoid interest charges, ensure that payment is made within 30 days after the designated billing office has received a proper invoice from the contractor, or within 30 days after Government acceptance, whichever is later. However, interest penalties are not imposed if payment delays are due to disagreement between the Government and contractor over the payment amount, or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract.

Unit 68 Assignment of Claims

FAR Subpart 32.8

- Describe the purpose for assigning claims.
- State some of the factors considered by COs in reviewing requests for assignment of claims.

Purpose

Once you have determined the amount owed the contractor, the question is where to deliver the check. The Assignment of Claims Act of 1940 permits a contractor to use its right to be paid by the Government for contract performance as security for a bank loan. Under an assignment, the lending institution makes a loan (or series of loans) to the contractor. The Government makes contract payments directly to the lending institution.

CO's Review and Determination

Before acknowledging an assignment, the CO must ensure, among other things, that the:

- Contract has been properly approved and executed.
- Contract permits assignment of claims.
- Assignment covers only money due or to become due under the contract.
- The assignment is to a bank, trust company, or other financing agency.
- The assignment has been properly executed.

Copies of the payment assignment are distributed to the:

- CO.
- Contractor.
- Lending institution.
- Disbursing Officer (of the office that will make payments under the contract).
- Surety on any bond applicable to the contract.

Unit 69 Administering Securities

FAR 49.402-3,
49.404, and
49.405

- List events in administering securities.

In Unit 21, you learned when to require the submission of bonds or other securities by a contractor. When administering contracts, the CO must ensure that the contractor maintains all securities required by the contract and obtain new bonds or other securities, when appropriate. Examples of situations that might call for special action on the part of the CO are shown in Exhibit 8-13.

SELECTED EVENTS IN ADMINISTERING BONDS	
<i>Situation</i>	<i>CO's Action</i>
Security disqualified.	Prompt the contractor to obtain a new bond from another surety.
Surety requests information on the contractor's progress, payments, and/or estimated percentage of completion on the contract.	Furnish the information.
Surety requests information on the contractor's progress, payments, and/or estimated percentage of completion on the contract.	Furnish the information.
Option exercised or the contract is otherwise modified.	Require a modified or additional bond if the penal sum of the bond is no longer adequate given the change in contract price.
Contract terminated for cause or default.	Determine whether (1) the surety will arrange for performance or whether (2) the Government will reprocure at the surety's expense, to the extent the surety is liable for reprocurement costs.

Exhibit 8-13. Selected Events in Administering Bonds

Unit 70 Administering Financing Terms (Invoices Against Fixed Price Contracts With Financing Terms)

FAR Subparts
32.2, 32.4, 32.5,
and 32.10

- Describe the general principles that govern the administration of financing payments to contractors.
- Describe factors in reviewing contractor requests for payments under the terms of standard FAR financing clauses in contracts for commercial items.
- Describe the process and procedures for making progress payments based on costs in contracts for non-commercial items.
- Describe the process and procedures for making performance based payments.

General Principles

As defined in Unit 21, “financing” refers to payments made to a contractor before supplies have been delivered or services rendered. Among the general principles in reviewing contractor requests for such payments during contract performance:

- Only pay amounts properly due the contractor under the clause.
- Avoid contractor indebtedness to the Government at the end of contract performance.
- Mitigate risks to performance of both the Government and the contractor from cash flow problems.
- Mitigate the Government's risk of providing payments when the contractor is not likely to perform for other reasons.

**Financing Under
Contracts for
Commercial Items**

FAR 52.232-29

Approve a contractor’s request for financing payments only if:

- Prior to any performance of work under the contract, advance payments do NOT total more than 15% of the contract price.
- Amounts are properly calculated and otherwise due.
- The items or services will be delivered or performed in accordance with all contract terms and conditions.
- There has been no impairment or diminution of the Government’s security.
- Payments are properly liquidated.

CONTRACT ADMINISTRATION PHASE

Progress Payments Based on Costs

When progress payments are based on costs, contractor submit an invoice—a “Contractor's Request for Progress Payment” (SF 1443) —for costs incurred in the prior period (e.g, the prior month).

FAR 52.232-16

The progress payments clause at FAR 52.232-16 is not a blank check. For instance, the contractor may only invoice costs that are reasonable, allocable to the contract, and consistent with sound and generally accepted accounting principles. There are other restrictions on the types of costs and the total amount which may be invoiced.

The CO may request an audit of contractor's records with respect to progress payments. Among other reasons, audits may be necessary when the CO has concerns about:

- The contractor's accounting system and controls.
- The reliability or accuracy of the invoices.
- The possibility of default, when invoiced costs are out of line with the contract's price or the value of work performed to date.

The rate of progress payments is established in the contract. Customarily, contractors are paid 80% of their cumulative total costs (85% for small businesses)—not to exceed 80% of the total contract price. When the contractor ships deliverables, prior progress payments are deducted (i.e., “liquidated”) from payments for the delivered units (up to a maximum of 80% of the price of the delivered units).

There is a certain amount of risk in providing up-front money to a contractor prior to receiving the deliverables. For example, there is always the risk that a contractor will go bankrupt before completing the work. Hence, the CO may suspend or reduce progress payments (or raise the liquidation rate) if the CO believes that the contractor is:

- Being over-reimbursed.
- Failing to make progress.
- On the verge of bankruptcy.
- Delinquent in payment of its suppliers.
- Refusing access to its books.
- Otherwise putting the Government at unreasonable risk under the circumstances specified in the progress payments clause.

The contractor may also be at risk if the amount of progress payments is not sufficient to cover major start-up costs. In that case, the CO (with higher-level approval) may choose to grant an “unusual” progress pay-

ment rate (i.e., a rate higher than 80% of incurred costs) or reduce the liquidation rate.

Other Types of Financing

FAR 52.232-12,
52.232-30, and
52.232-32

The FAR provides for other types of financing for both commercial and non-commercial items, including installment payments, advance payments, and performance based payments. These are more rarely encountered. If your contract incorporates clauses that provide for such payments, carefully follow the instructions in those clauses for making the payments — with due concern for the protections in those clauses of the Government's interests.

Unit 71 Unallowable Costs (Invoices for Reimbursement of Costs)

FAR Part 31 and
Subpart 42.8

- State the factors to consider in determining whether a contractor's invoiced costs are allowable.
- Describe the CO's appropriate response to an invoice containing unallowable costs.

Factors in Determining Allowability

Cost-reimbursement type contracts provide for payments to contractors, based on costs incurred in performance of the contract—and an appropriate percentage of the fee—during the billing period. Costs claimed include direct costs (e.g., for labor and materials), indirect costs (e.g., overhead costs), and G&A (General and Administrative costs).

To be reimbursable, the costs that the contractor claims must be allowable. Exhibit 8-14 presents the factors used in determining whether costs are allowable.

Procedure for Disallowing Costs

Ordinarily, auditors render opinions on the allowability of invoiced costs. Based on audit findings, the CO issues a notice to suspend or disallow part or all of the incurred, invoiced costs. The notice provides contractors with an opportunity to respond in writing with evidence that the disputed costs are in fact allowable. Based on the contractor's response, the CO may choose to:

- Allow all of the disputed costs, if the contractor's evidence sustains their allowability.
- Allow part of the disputed costs, if the contractor's evidence sustains their allowability in part.
- Allow none of the disputed costs.

This decision is provided to the finance office, with instructions for paying the allowable costs (if any) on the invoice.

CONTRACT ADMINISTRATION PHASE

ALLOWABLE CONTRACTOR COSTS		
<i>Factor</i>	<i>The Question</i>	<i>For Instance . . .</i>
Reasonableness	Is the cost reasonable (i.e., would it have been incurred by a prudent person in the conduct of competitive business)?	Is the contractor billing the Government for rent on unoccupied, unneeded space?.
Allocability	Is the Government paying its fair share of indirect costs for work under the contract?	Is the Government being charged 100% of the shop foreman's salary, when in fact the shop foreman also supervised work under five other contracts with private sector firms during the billing period?
Accounting Principles	Is the cost properly charged to the Government under Cost Accounting Standards or generally accepted accounting principles?	Per the "consistency" principle, has the contractor consistently included the costs of tooling in its manufacturing overhead pool from one billing period to the next?
Terms of the Contract	May the invoiced cost be paid under the contract's terms and conditions?	The Government might not have to reimburse the contractor for costs in excess of the total estimated cost in the schedule for a cost reimbursement contract (see Unit 73).
Limitations in FAR Part 31	Is the Government prohibited by FAR Part 31 from paying the cost as invoiced?	The Government is prohibited by FAR 31.205-51 from paying for the costs of alcoholic beverages.

Exhibit 8-14. Allowable Contractor Costs

Unit 72 Payment of Indirect Costs (Invoices for Reimbursement of Costs)

FAR Subpart 42.7

- Define indirect costs and billing rates.
- Describe the process for establishing final indirect rates.
- Explain how COs apply those rates to determine the amount of money to reimburse the contractor for the indirect costs of a cost-reimbursement contract.

Indirect Costs Defined

Indirect costs are costs that are incurred by a contractor over and above costs that can be charged directly to any individual contract. For instance, the President of the contractor's firm may not spend any time on any individual contract. Nonetheless, the cost of his salary has to come out of all contracts performed by that firm. The solution is to fairly allocate a percentage of his salary to every contract, based in part on the relative dollar amount of each contract.

Billing Rates

Upon receipt of monthly invoices pursuant to a cost reimbursement contract, the CO uses "billing rates" to reimburse the contractor for indirect costs incurred during that month. At contract closeout, however, the CO has to recalculate the entire amount owed the contractor for the indirect costs of the contract (which may result in paying the contractor an additional amount over what was previously billed — or the contractor may have to pay some of that amount back).

Final Indirect Rates

Ordinarily the CO or an auditor negotiates final indirect cost rates to be used in allocating the total dollar value of indirect costs incurred during an accounting period (e.g., the firm's fiscal year) to all work performed during that period — including the Government's cost reimbursement contracts with that firm. However, in certain situations, the contracting officer responsible for contract closeout may negotiate the settlement of indirect costs for a specific contract using quick closeout rates.

Applying Billing and Final Indirect Rates

Once rates are established, the CO multiplies the rate by the designated base to calculate the dollar amount to pay the contractor for each category of indirect cost allocable to the contract. For example, the auditor may have negotiated a final manufacturing overhead rate of 84% of the amount owed the contractor for direct material costs. If the contractor incurred direct material costs against a given cost reimbursement contract in the amount of \$800,000, the Government would owe the contractor an additional \$672,000 ($\$800,000 \times .84$) for manufacturing overhead costs.

Unit 73 Limitation of Costs (Cost Reimbursement, Labor Hour, and Time & Material Contracts)

FAR 32.704

- Identify types of contracts that limit costs, and the contractor's responsibility for notifying the CO that it is approaching the limit of funds allotted.
- State several specific actions that a CO may take in response to an indication that a contractor is approaching the funding limit.

Contract Types that Limit Costs

The Government uses cost-reimbursement, labor hour, or time and materials contracts when there are uncertainties about the work to be performed and, therefore, costs cannot be accurately estimated. Such contracts contain either a ceiling price or, in the case of cost type contracts, a total estimated cost (exclusive of fee). In performing the contract work, the contractor may only exceed the ceiling price or estimated cost at its own risk.

Notification Requirements

Under the terms of a cost reimbursement contract, the contractor is required to notify the CO when it is within 60 days of expending 75% of the total estimated cost of the contract. Time and materials and labor hour contracts similarly oblige the contractor to notify the CO when it is within 30 days of expending 85% of the ceiling price. In addition, the CO, or his or her representatives, independently monitor the contractor's cost performance against the total amount obligated for the work.

Alternative Solutions to Potential Cost Overruns

If it appears that the contractor will be unable to complete the contract within the estimated cost or ceiling price, the CO, in cooperation with the requiring activity, must decide whether to:

- Reduce the scope of work to fit the remaining available funds.
- Let the contractor proceed under the current Statement of Work and funding, and when the funds are exhausted, obtain the fruits of the contractor's labors to that point.
- Negotiate a new estimated cost, obtain the additional funds, and modify the contract to permit continuation of the work until the work is complete or until the available funds are again exhausted (whichever comes first).

When a contract cannot be completed within the estimate and must receive additional funding, it is known as a "cost overrun."

Unit 74 Price and Fee Adjustments (All Contract Types That Provide For Such Adjustments)

FAR Subparts
16.2 and 16.4

- List types of price and fee adjustments.
- Describe the process for establishing an award fee.

Types of Adjustments

The contracts may contain a clause with a formula for adjusting the fee or price for the work performed. To apply the formula for adjusting the fee or price, COs may consult auditors, technical personnel, or other agency personnel. For example, requirements managers often participate on panels that recommend the amount of the award fee. Other than in award fee contracts, contractors generally have the right to present their views on the application of the formula. Afterwards, COs modify the contract to reflect their final determination on the price or fee to be paid under the contract.

TYPES OF PRICE AND FEE ADJUSTMENTS

Economic price adjustments.

Addition of an “award fee” to the base price or fee of a fixed-price or cost plus award fee contract.

Establishment of the final price of a fixed-price incentive contract or final fee of a cost plus incentive fee contract.

Prospective or retroactive redetermination of the negotiated price under a price redetermination contract.

Exhibit 8-15. Types of Price and Fee Adjustments

Determining the
Award Fee

Award fee contracts are popular in service contracting as a proven tool to encourage and reward exceptional performance. However, you cannot simply award any arbitrary amount based on irrational exuberance. Rather, you must collect empirical data on the contractor’s performance against each criterion in the contract for determining the fee.

CONTRACT ADMINISTRATION PHASE

With these data in hand, the CO then assembles the award panel and:

- Presents the evaluation criteria and rating plan.
- Provides the panel with any relevant data from performance monitoring.
- Instructs the panel to apply the criteria, rate overall performance, and document their findings as prescribed in the award fee clause and agency policies.

The CO must ensure that the panel's findings and recommendation conform strictly to the contract's stated evaluation criteria and rating plan. And the contractor ought to have an opportunity to review and comment on the panel's findings.

Based on the panel's recommendations, the CO determines the amount of the award fee and adds it either to the base fee or price. The amount of the award fee or price should fall within the range established in the contract.

Unit 75 Collecting Contractor Debts

FAR Subpart 32.6

- State the different ways contractor debts can originate.
- Describe the principal methods used by the Government to collect contractor debts.

When Contractors
Owe the Govern-
ment

Usually it is the Government that owes money to the contractor. But it can be the reverse. A contractor may owe money to the Government for reasons such as:

- Assessment of liquidated damages.
- Damages or excess costs related to defaults (e.g., reprocurement costs).
- Overpayments resulting from discrepancies between the quantities billed vs. the quantities delivered.
- Government expenses for correcting latent defects in supplies furnished by the contractor.

Collecting Debts

When the CO or other responsible official learns of a debt, he or she collects the debt, including interest. Debt collection requires the cooperation of several Government officials including the CO, disbursing officials, and auditors.

Depending on the nature of the indebtedness and the financial condition of the contractor, the Government collects debts through:

- “Setoffs” against the contractor’s next invoice or invoices. The Disbursing Officer will make such “setoffs” as checks are written.
- Cash payments from the contractor, either for the full amount or on a deferred payment schedule.
- Applying tax credits that are due to the contractor against the debt.

Unit 76 Accounting and Estimating Systems

- State when it is necessary to review and accept a contractor’s accounting system.
- State when it is appropriate to review the acceptability of a contractor’s cost estimating system.

Accounting Systems

FAR 52.215-2

The CO ensures that the contractor has an acceptable accounting system before awarding contracts for which the Government requires data on actual incurred costs. To confirm amounts claimed by the contractor as incurred costs, the contractor’s accounting system must provide an accurate and complete “audit trail” for Government auditors and the CO.

Estimating Systems

FAR 15.407-5

In addition, the Government may periodically review a contractor’s estimating system. This is especially appropriate when that contractor will be generating a significant number of proposals for large negotiated contracts. One critical concern is whether the contractor estimates costs on the same basis that it accounts for costs. If a contractor has an accurate estimating system, it enhances the reliability of individual proposals and it expedites the negotiation process.

Both types of reviews are normally accomplished by the cognizant audit and contract administration offices. The CO may request either type of review (or both).

Unit 77 Cost Accounting Standards

FAR Part 30 and Appendix

- Identify the purpose of Cost Accounting Standards (CAS) and exclusions to their application.
- Describe Disclosure Statements and their impact on contract costs.

CAS Coverage and Exclusions

The Government has issued a series of Cost Accounting Standards (CAS). These standards are meant to achieve uniformity in cost accounting practices and procedures among Government contractors. Cost Accounting Standards do not apply to all Government contracts. For example, CAS compliance is not required for the following types of contracts, among others (see the FAR Appendix, section 9903.201-1, for the full list):

- Sealed Bid contracts.
- Negotiated contracts and subcontracts at \$500,000 or less.
- Contracts and subcontracts with small businesses.
- Firm fixed-priced and fixed-price with economic price adjustment (provided that price adjustment is not based on actual costs incurred) contracts and subcontracts for the acquisition of commercial items.
- Contracts and subcontracts for which prices are set by law or regulation.
- Firm-fixed price contracts and subcontracts awarded without submission of any cost data.

In addition, some business entities may not be subject to “full” CAS coverage but only to “modified” coverage. Only a few of the Standards in Part 30 apply when the coverage is “modified.” Full coverage is required if the entity has received:

- Net awards totaling \$25 million or more in CAS-covered contracts and subcontracts during its preceding accounting period — including at least one exceeding \$1 million, or
- A single award of \$25 million or more during the current period.

Disclosure Statements

When the contractor’s accounting system is covered by CAS, the contractor submits disclosure statements as provided in the contract. A disclosure statement is a written description of the contractor’s cost accounting practices and procedures.

The Government checks the disclosure statement to ensure that:

- The statement adequately represents the contractor's actual accounting practices.
- The disclosed accounting practices conform to the CAS.

When contractors change accounting practices to conform with the CAS, or for other reasons, COs determine the impact of the accounting changes on any affected contracts and, where necessary, negotiate adjustments in their prices.

Unit 78 Defective Pricing

FAR 15.407-1

- State circumstances that are likely to suggest that contractor cost or pricing data may be invalid.
- Describe the actions that the CO should take when the CO suspects that submitted data are defective.

Defective Cost or Pricing Data

When required (as discussed in section Unit 38), CO's obtain cost or pricing data from offerors or, with respect to contract modifications, from contractors. The contractor ordinarily certifies that the data are accurate, current, and complete as of the date of the final agreement on price.

Later, the Government may discover that the data were defective in some respect. Some potential tip-offs:

- For no apparent reason, data submitted as part of an ongoing negotiation differ significantly from data submitted in earlier negotiations.
- Invoiced costs are substantially lower than estimated.
- Market data are not consistent with submitted data.
- Audits of the firm's estimating or accounting system have raised general questions about the firm's data submissions.
- After submitting certified data from an intended subcontractor, the prime has either assigned the work to a different subcontractor or brought the work in-house.

Corrective Actions

Such indicators may prompt the CO to request an audit of the certified data. If the auditor finds that some or all of the data were inaccurate, incomplete, or not current, the CO must determine whether the defective

CONTRACT ADMINISTRATION PHASE

data had (1) been relied on by the Government's representatives during negotiations and (2) had a significant effect on price or cost.

If the defective data had mislead the CO into overestimating the cost of performing the contract, the Government is entitled to a commensurate reduction in the contract price and interest on any overpayments.

8.4 SPECIAL TERMS

Initiation of Work And Modification	Quality Assurance	Payment & Accounting	Special Terms	Contract Closeout Or Termination
			79. Property Administration 80. Intellectual Property 81. Administering Socio-Economic & Other Misc. Terms	

*Exhibit 8-16. Steps in Administering Special Terms***Unit 79 Property Administration****FAR Part 45**

- State the CO's role in property administration.
- State the general approaches that the CO uses to settle cases of Government property lost or damaged during contractor use.
- Describe the Government's alternatives for disposing of furnished property.

The CO's Role

Some contracts provide for the furnishing of Government property to the contractor. Such contracts impose obligations on the Government, such as putting the property into the contractor's hands by the dates specified in the contract. The CO therefore has to track the performance of the Government as well as of the contractor in terms of compliance with property-related clauses.

When the Government furnishes property, the contractor is responsible for inventorying, maintaining, and protecting the property. The contractor must also ensure that the property is only used for purposes of the contract. In addition, the Government at times is entitled to property acquired by the contractor for work on the contract. That property also must be inventoried, maintained, protected, and properly utilized. Therefore, CO's typically rely on Government property specialists to:

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- Confirm that the contractor has an adequate property management system.
- Monitor the contractor's management of the property.
- Oversee recovery or disposal of the property.

Loss or Damage As a general rule, contractors are responsible and liable for Government property in their possession. What if the contractor loses or damages government property? The CO must first determine the value and extent of the damage and the contractor's liability for the damage, if any. The CO then works with the contractor to repair or replace the property or otherwise mitigate the damage, as provided in the property clause.

Disposal When the contractor has finished working with the Government's property, the CO must recover the property or see to its disposal. At times, used Government property may be left with the contractor to:

- Save money.
- Expedite performance on other contracts with that firm.
- Ensure standardization of products delivered under other contracts.
- Describe requirements for documenting past performance

Unit 80 Intellectual Property

FAR Part 27

- Identify the obligations of contractors to honor existing patents and data rights and the corresponding obligation of the CO to protect the Government against claims of patent or copyright infringements.
- Describe FAR policies on providing titles to patents and copyrights for the products of Federally funded research.

The Contractor's Obligation to Honor Patents and Copyrights

Often, the Government contracts for work that requires use of patented inventions or copy righted materials. In such cases, the contract generally requires that the contractor:

- Honor rights in patents, data, and copyrights, and comply with the stipulations of law in using or acquiring such rights (e.g., by obtaining permission from copyright owners before including privately-owned copyrighted works in data required to be delivered under Government contracts), AND
- Indemnify the Government against infringement of patents, trademarks, and copyrights resulting from contract performance.

COs should be alert to any signs of potential violations of these terms and immediately notify the contractor of such violations. In particular, the clause at 52.212-4(h) requires the Government to reasonably notify the contractor of any claims and proceedings initiated by a third party before the Government can claim entitlement to indemnification by the contractor against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, the patent, trademark or copyright.

Contractor Requests to Patent and Copyright Products of Federal Research

A related question is the Government's rights and responsibilities when a contractor seeks to patent or copyright the products of research done at the taxpayer's expense.

To the extent permitted by law, Federal contracts give the contractors title to patents made in whole or in part with Federal funds, in exchange for royalty-free use by or on behalf of the Government. The goals of this policy in part are to:

- Encourage maximum participation of industry in federally supported research and development efforts,
- Promote the utilization of inventions arising from federally supported research or development, and
- Promote the commercialization and public availability of the inventions made in the United States.

These same clauses generally to give the Government the right to ensure that the patents are made available for commercial use if the contractor otherwise attempts to sit on them (e.g., by exercising "march-in" rights to license the patent to third parties that apply for such license).

Hence, when the Government pays for research and development, ensure that:

- Inventions are identified, disclosed, and reported as required by the contract and elections made.
- The rights of the Government in such inventions are established.
- Where appropriate, patent applications are timely filed and prosecuted by the contractor or the Government.
- Expeditious commercial utilization of such inventions is achieved.

FAR section 27.404(f)(1) establishes policies regarding data first produced in the performance of a contract. Normally, without prior approval of the contracting officer, contractors may copyright technical or scientific articles based on or containing data first produced in the performance of work and published in academic, technical or professional journals, symposia

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proceedings and similar works. Otherwise, generally the contractor has to request the permission of the CO to copyright the data. COs usually grant such permission when copyright protection will enhance the appropriate transfer or dissemination of the data and the commercialization of products or processes to which it pertains. Having established these general principles, however, carefully read the language of the contract and FAR Part 27.404 before granting permission to copyright data produced at Government expense; and ensure that the contractor does not copyright such materials without permission.

Unit 81 Administering Socio-Economic and Other Miscellaneous Terms and Conditions

- List socio-economic clauses in contracts for commercial items.
- Identify the CO's responsibilities for enforcing compliance with socio-economic clauses.

Typical Socio-Economic Clauses

FAR 52.212-4(q)
and (r)

Federal contracts generally contain clauses to promote accomplishment of socio-economic goals. Even contracts for commercial items require contracts to comply with:

- “All applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract”, and
- “31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. 327, et seq., Contract Work Hours and Safety Standards Act; 41 U.S.C. 51-58, Anti-Kickback Act of 1986; 41 U.S.C. 265 and 10 U.S.C. 2409 relating to whistleblower protections; 49 U.S.C. 40118, Fly American; and 41 U.S.C. 423 relating to procurement integrity”.

CO's Role

Generally, the CO's role is to investigate reports and complaints of non-compliance with requirements of the contract for compliance with labor laws, environmental laws, privacy laws, drug-free work place policies, and the like. As early as they occur, the CO should identify and document potential breaches of these requirements and report them to the contractor for correction. Also, keep the relevant agencies (e.g., the Department of Labor and the Environmental Protection Agency) advised of any problems as appropriate given the policies and procedures established for that purpose. Assess the impact of potential problems on performance and delivery requirements, identify and when necessary apply any special contractual remedies, and be prepared for the worst (e.g., a need to terminate for cause or default).

8.5 CONTRACT CLOSEOUT OR TERMINATION

Initiation of Work And Modification	Quality Assurance	Payment & Accounting	Special Terms	Contract Closeout Or Termination
				82. Claims 83. Termination 84. Closeout 85. Fraud & Exclusion

Exhibit 8-17. Steps in Claims Resolution, Close-Out, and Termination

Unit 82 Claims

FAR Subpart 33.2

- Define the term “claim.”
- Describe the procedures for determining the validity of a claim made by a contractor.
- State how claims are handled; who decides; what are the rights of contractors when disputes arise.

Claim Defined

A claim is a written demand or written assertion by a contractor (or the Government) that it is entitled to:

- Additional money “in a sum certain”.
- Adjustment of contract terms (e.g., the delivery schedule) or a more favorable interpretation of the terms.
- Other relief arising under or related to the contract.

For example, suppose a CO unilaterally orders that widgets be painted with two coats of paint, instead of the one coat specified in the contract. The contractor would have to apply the extra coat. However, the contractor may request (i.e., claim) \$5,000 for the extra coat of paint over and above the original price of the contract. To constitute a claim, the contractor must submit the request for payment in writing to the CO.

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If the claim exceeds \$100,000, the contractor must also submit a certificate that:

- The claim is made in good faith;
- Supporting data are accurate and complete to the best of the contractor's knowledge and belief; and
- The amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

Resolving Claims

Upon receiving a claim, the CO may take the following steps:

1. Research the claim and prepare a finding of facts. Among other things, the CO may ascertain whether the claim is:
 - Timely?
 - Covered by an existing release of claims?
 - Barred by the contract clause at issue (e.g., clause at 52.219-10, which states that the determinations thereunder are not subject to the Disputes clause)?
 - Supported by sufficient, accurate, and complete data?
 - Factually correct?
 - Correct in its interpretation of the terms and conditions at issue and related case law?
2. Prepare the Government's initial position on the claim and on the amount of any equitable adjustment in price or other terms.
3. Discuss the claim with the contractor and try to reach a mutual agreement. For this purpose, COs are being encouraged to use any authorized, applicable Alternative Dispute Resolution procedure (such as mediation, arbitration, and mini-trials, among others).¹
4. Prepare a decision on the claim, issue the decision in writing to the contractor, and initiate payment (if any).

In working through these steps, the CO generally draws on the advice and expertise of technical, audit, and legal office personnel.

In the case of the \$5,000 claim for the extra coat of paint, the CO may conclude that the contractor is entitled to an equitable adjustment in price but that the price should be increased by only \$3,800. If the two parties cannot negotiate a mutually agreeable settlement, the CO will render a final decision to only pay the contractor the lesser of the two amounts.

If the contractor disagrees with the CO's decision, the contractor may appeal the decision to the cognizant Board of Contract Appeals or to the courts.

Unit 83 Termination

FAR Subpart 12.4
and Part 49

- State circumstances that may signal the need for terminating a contract.
- Name the two major classes of termination actions.
- Identify typical issues in contract termination.

When to Terminate

A contract is entered into because the Government has a need to fulfill and the contractor agrees to fulfill it in return for specific compensation. The Government reserves the right to get out of a contract, in prescribed circumstances, by including termination clauses in its contracts (e.g., FAR clause 52.212-4 sections (l) and (m), which provide respectively for termination for convenience and for cause in contracts for commercial items).

There are two principal reasons why the Government terminates contracts:

- The Government's requirement has substantially changed or has been cancelled.
- The contractor fails, or is failing, to perform as required by the contract.

Termination for Convenience

When the Government's requirement has changed substantially or been cancelled, the CO may exercise the Government's right to terminate the work for the "Convenience of the Government". For example, suppose the contract is for one year of janitorial services. A few months after the contract starts, the agency relocates and the janitorial services are no longer required. The CO issues a unilateral notice terminating the remainder of the contract for the convenience of the Government. That action will usually be followed by a bilateral supplemental agreement reflecting the resulting change in price, disposition of property, etc.

Termination for Cause or Default

When the contractor is failing to perform, the CO may exercise the Government's right to terminate the work, in whole or in part, as provided in the "Default" clause (T for D) of contracts for non-commercial items or 52.212-4(m) in contracts for commercial items. For example, suppose a contractor is unable to secure the needed personnel and cannot perform the work of a fixed price contract. The CO may terminate the contract for default, secure services from another source, and bill the terminated contractor for the excess costs of reprocurement.

When the Government has sufficient evidence to suspect that delivery or other performance requirements are not likely to be met, the CO may

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choose to immediately take action rather than wait for the contract's delivery date. In these cases, the CO issues a "cure notice" if the time remaining in the contract delivery schedule is sufficient to permit a "realistic" cure period of 10 days or more. If the cure notice fails to remedy the problem, then termination for default proceeds forthwith. If, on the other hand, the delivery date has arrived, the CO may issue a "show cause" letter or immediately initiate a default termination.

All contracts have a Termination for Convenience clause, but not all contracts have a Default clause. For example, cost-reimbursement R&D contracts with educational institutions do not have a Default clause.

Termination Issues

Terminations are often complicated, so much so that some agencies have even appointed Termination CO's to manage terminations and negotiate settlements on a full-time basis. Terminations are particularly complicated in production contracts when some work has been completed, some work is in progress, and materials have been purchased for work not started. For instance, some of the issues that might be discussed with the contractor when terminating include:

- Extent of the termination, the point at which the work stopped, and the Government's specific instructions for terminating the work.
- Terminating subcontracts.
- The termination inventory.
- Title transfer and delivery schedule for completed supplies and for manufacturing materials (e.g., partially completed supplies and materials, parts, tools, dies, jigs, etc.).
- Status of plans, drawings, and data that would have been delivered under the completed contract.
- Protection and preservation of any property in the Contractor's possession in which the Government has an interest.
- Preparation and submission of settlement proposals (i.e., the dollar amount owed the contractor), including any related requirement for certified cost or pricing data.
- Any counterproposal by the contractor to continue work under the contract.

CHAPTER 8

Unit 84 Closeout

FAR 4.804 and
4.805

- Identify the purpose of contract closeout and participants in closeout.
- List eight typical steps in contract closeout..

Purpose and Participants

A contract concludes when all deliverables have been accepted, the contractor has been paid, and the contract's other terms and conditions have been satisfied. A contract must be closed out administratively to ensure that in fact all contractual obligations have been met by both parties, and that government interests are protected.

The CO often relies on other personnel to help determine that the contract is ready for closeout. For example:

A **Property Administrator** may be responsible for certifying that all Government-furnished property has been either returned or accounted for.

The **Requiring Activity** may be responsible for confirming that any final reports required have been received.

The **Office of Counsel** may be responsible for confirming that any required patent statements have been filed, etc.

Exhibit 8-18 lists eight general steps in closing out a contract.

Unit 85 Fraud and Exclusion

- Define the term fraud.
- Identify indications that fraud or other civil or criminal offenses by a contractor or Federal personnel have occurred.
- Identify the method for reporting fraud and, upon a finding of fraud, excluding firms from future contract awards.

Definition

Fraud is a felonious act of corruption, or an attempt to cheat the Government or corrupt its agents.

STEPS IN CONTRACT CLOSEOUT

1. Verify that the contract is physically complete (e.g., that all required supplies have been delivered, inspected (if appropriate), and accepted.
2. Obtain forms, reports, and clearances, such as:
 - The contractor's final invoice.
 - The contractor's closing statement and/or release of claims.
 - Plant clearance report.
3. Verify that the Government and the contractor have satisfied other terms and conditions for closeout, such as:
 - Return or disposition of Government property.
 - Disposition of classified materials.
4. Settle any outstanding issues, such as:
 - Disallowed costs.
 - The final price or fee of an incentive contract.
 - The award amount of an award fee contract.
5. Verify that there are no outstanding claims or disputes.
6. Make final payment and deobligate remaining funds, if any.
7. Prepare a contract completion statement and, based on the retention schedules in FAR 4.805, provide for disposal of files.
8. Determine whether to invoke phase-in/phase-out rights under the "Continuity of Services" clause (FAR 52.237-3).

Exhibit 8-18. Steps in Contract Closeout.

CHAPTER 8

Fraud Indicators

Examples of indicators of fraud on the part of Government personnel:

- Improper disclosure of information on pending or ongoing procurements.
- Slanting specifications to the products or capabilities of a single contractor without adequate justification for such slanting.
- Splitting requirements to get under the small purchase threshold.
- Falsified statements in sole source recommendations.

Examples of indicators of fraud and other improper conduct on the part of contractors:

- Bid suppression or limiting, complementary bidding, bid rotation, or market division.
- Bribes and gratuities.
- False invoices and cost mischarging.
- Falsification of Government furnished property records.
- Failure to update cost or pricing data upon receiving information that prices have decreased.

Reporting Fraud; Excluding Contractors

If you find any such indication of fraud or other improper conduct on the part of an offeror, contractor, or Government personnel, report all relevant data to the agency's Inspector General and to other relevant Government officials, as provided in your agency's procedures.

Prospective contractors who are convicted of fraud, or who have seriously violated the terms of a Government contract(s) or subcontract(s), may be excluded from receiving a Government contract. Performance problems may also be a basis for exclusion (see Unit 48). COs refer to the "List of Parties Excluded From Government Procurement Programs" to determine whether or not an offeror is debarred, suspended, proposed for debarment, or otherwise excluded from consideration.